EX PARTE OR LATE FILED

COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE, N. W.
P.O. BOX 7566
WASHINGTON, D.C. 20044-7566
(202) 662-6000

FACSIMILE: (202) 662-6291

EX PARTE OR LATE FILED

June 29, 1999

GERARD J. WALDRON
DIRECT DIAL NUMBER
(202) 662-5360

DIRECT FACSIMILE NUMBER
(202) 778-5360

gwaldron@cov.com

LECONFIELD HOUSE
CURZON STREET
LONDON W1Y 8AS
ENGLAND
TELEPHONE: 44-171-495-5655
FACSIMILE: 44-171-495-3101

KUNSTLAAN 44 AVENUE DES ARTS
BRUSSELS 1040 BELGIUM
TELEPHONE: 32-2-549-5230
FACSIMILE: 32-2-502-1598

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445-12th Street, S.W.
12th Street Lobby
Counter TW-A325
Washington, D.C. 20554

Re: CC Docket No. 96-115, Subscriber List Information and CC Docket No. 96-98, Local Telephone Competition
Ex Parte Notice

Dear Ms. Salas:

Today Lois Pines, Evan Marwell, Phil Weiser (via phone) and the undersigned met with Bob Atkinson, Kurt Schroeder, Bill Kehoe and Greg Cook with the Common Carrier Bureau to discuss the attached letter and matters raised in INFONXX's earlier filings. If you have any questions, please contact the undersigned.

Sincerely,

Gerard J. Waldron

Gerard J. Waldron
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000

Counsel to INFONXX

Enclosure

cc: Bob Atkinson
Kurt Schroeder
Bill Kehoe
Greg Cook
Service List

No. of Copies rec'd 0+3
List A B C D E

COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE, N. W.
P.O. BOX 7566
WASHINGTON, D.C. 20044-7566
(202) 662-6000

FACSIMILE: (202) 662-6291

GERARD J. WALDRON
DIRECT DIAL NUMBER
(202) 662-5360

DIRECT FACSIMILE NUMBER
(202) 778-5360

gwaldron@cov.com

LECONFIELD HOUSE
CURZON STREET
LONDON W1Y 8AS
ENGLAND
TELEPHONE 44-171-495-5655
FACSIMILE 44-171-495-3101

KUNSTLAAN 44 AVENUE DES ARTS
BRUSSELS 1040 BELGIUM
TELEPHONE 32-2-549-5230
FACSIMILE 32-2-502-1598

June 28, 1999

Mr. Robert Atkinson
Deputy Chief
Common Carrier Bureau
Federal Communications Commission
445 Twelfth St., SW
Washington, D.C. 20554

Re: CC Docket No. 96-115, Subscriber List Information

Dear Bob:

As the Commission considers rules interpreting and implementing Section 222(e) of the Communications Act, a provision that holds great potential to facilitate full and fair competition in the directories market, we urge you to construe Section 222(e)'s protections to include those companies publishing directories orally, i.e., directory assistance (DA) providers. The breadth of the statutory language – to protect persons publishing directories "in any format" – and the converging methods of delivering subscriber listing information to customers require a broad approach. Such an interpretation would withstand any court challenge and would facilitate competition.

The Market For Directory Information Is Rapidly Evolving With Available Technology, and Section 222(e) Is Designed To Evolve With The Market.

Telephone customers have historically accessed directories of subscriber listing information through one of two means: (1) written publications; or (2) live operators who responded to specific requests. Over the last decade both segments of directory publishing – printed directories and audio directory assistance – have witnessed the introduction of competition, but both have been and continue to be hampered by Incumbent Local Exchange Carrier (ILEC) charges and practices designed to prevent competitors from gaining equal access to the subscriber listing information obtained by the I-LEC by virtue of its monopoly position. More recently, some providers have begun using the Internet as a third method of delivering subscriber listing information (SLI) to consumers. Typically an Internet site responds electronically to specific requests for customer information. Today there are many Web sites that provide this information.

Consistent with its pro-competitive vision, the Telecommunications Act of 1996 charged the Commission with facilitating competition in the directories market. But rather than limit the class of providers entitled to subscriber listing information, Congress mandated in Section 222(e) that persons who publish directories "in any format" are eligible to receive such information. In implementing Section 222(e), the Commission must determine, among other things, (1) whether directory assistance (DA) providers who publish information orally or electronically constitute a "publish[er of] directories in any format" and, (2) if so, what are "nondiscriminatory and reasonable rates, terms and conditions" for access to such data. As we have set forth in previous filings, DA providers constitute publishers of directories for Section 222(e) purposes.[1] Having made that determination, the Commission also should find that the appropriate benchmark for nondiscrimination is similarly situated providers of operator assisted DA service.

From the consumer perspective, equal access for competitive DA providers is important to protect against the hazards of receiving inaccurate information: the time and expense of dialing wrong numbers. Without equal access to the SLI for DA providers, consumers will continue to suffer because they (or their carrier) choose a supplier other than the incumbent. In 1999, for example, INFONXX predicts that, on account of the unavailability of non-discriminatory SLI access to DA providers, consumers will receive some 40 million wrong numbers.[2] Moreover, in a wireless environment, the additional time it takes a competing provider to access databases to find the requested number further hurts consumers, who are forced to stay on the phone longer, leading to an additional $17 million of airtime costs borne by consumers each year.

The Commission Should Give Full Effect To the Statutory Language And Define "Publisher" To Include Directory Assistance Operators.

It is well settled that publishing can occur orally as well as in written form.[3] Thus, as we explained in our prior filings, the plain reading of the statute is an interpretation that grants all publishers of directories -- whether in written, electronic, or oral format -- access to the SLI. While the directories most often used by customers in 1996 were in printed form, Congress chose broad language so as not to lock in any particular

---

[1] INFONXX's previous filings are attached.

[2] This number is arrived at by taking the estimate of approximately 400 million directory assistance calls that will be handled by competitive providers this year (of which INFONXX will handle approximately 100 million). Using the industry average rate of accurate listings, which between 88-90%, we arrive at the figure of 40 million wrong numbers per year. As the industry's quality leader, INFONXX actually achieves a higher accuracy rate – between 93-95% -- and thus INFONXX alone will receive (and distribute) approximately 5 million wrong numbers when American consumers call 411 this year.

[3] See, e.g., Webster's New World Dictionary 1087 (3d coll. ed. 1988) (defining "publish" as "to make publicly known; announce, proclaim, divulge or promulgate"); 2 Compact Edition of the Oxford Dictionary 1561-62 (1971) (explaining that one "publishes" information by making it "generally known," or by "tell[ing]," or "mak[ing] generally accessible or available for acceptance or use"); Black's Law Dictionary 1233 (6th ed. 1990) (to "publish" information is "to utter" it); Gertz v. Welch, 418 U.S. 323, 332 (1974) (both a newspaper (in print) and a broadcaster (in oral form) can commit libel by "publish[ing] defamatory falsehoods about an individual.").

technology or format. To limit this phrase to directories only in a printed format would defy the Act's pro-competitive and forward-looking perspective. Moreover, such a limited construction of Section 222(e) would ignore the canon that statutory commands must be given their full meaning. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."); *Association of Bituminous Contractors v. Andrus*, 581 F.2d 853, 862 & n.22 (D.C. Cir. 1978) (all words in a statute are to be assigned a meaning and are not to be considered mere surplusage).

A reading of Section 222(e) that protected certain directories -- i.e., those published electronically, one name at a time, over the Internet -- but not other directories -- i.e., those published orally, one name a time, over telephone lines--would be arbitrary, capricious, and technologically-biased. At present, the technologies used to deliver directory information are converging such that users will be able to access electronic directories from remote locations (for instance, from a Palm Pilot), and will be able to request and receive such information in audio form through voice recognition technology. Indeed, the next generation of wireless telephones may well enable users to choose between an electronic directory and a live operator for subscriber information. (And the electronic directory may well be able to receive and convey information in audio form.) Thus, from a competitive perspective, regulatory policy should not privilege one of these technologies over the other by construing Section 222(e) to protect Internet providers, but not DA ones (or vice versa).

Most assuredly, Section 222(e) refers to publishers of printed directories; Congress made that clear. The question for the Commission is whether that was all Congress meant when it referred to persons who publish "in any format". (Of course, if Congress wanted to close the matter, it could have referred to "persons who publish printed directories".) Given the technical considerations and policy issues related to the Commission's determination of who constitutes a "publisher" in "any format," an interpretation that directory assistance providers fall within the scope of Section 222(e) should easily withstand appellate review.

Under *Chevron*, the Commission enjoys substantial leeway to apply its expertise in determining who falls within "any" format and who is a relevant "publisher" of directory information. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In *Chevron*, the Court stressed that where a statutory term does not admit of only a single interpretation, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Applying this standard, the Court concluded that because "Congress did not have a specific intention on the applicability of [a basic statutory term] in these cases . . . the EPA's use of that concept here is a reasonable policy choice for the agency to make." *Id.* at 845. Thus, defining "publisher in any format" as including all formats of publishing information – electronically, orally, and in written form – is not only a reasonable interpretation, it also

would serve the Act's purposes of facilitating competition in all markets and of being technologically neutral.[4]

The Commission Can Take A Number Of Steps To Promote Competition In The Directories Market.

INFONXX urges the Commission to consider the following steps to address the serious obstacles confronting persons disseminating directory assistance information to consumers.

Rule that Section 222(e) requires carriers to make available to DA providers SLI at the same rates, terms, and conditions as their competitors, the CLECs, receive such information. This decision would give full effect to the pro-competitive goal of the 1996 and the broad language in Section 222(e). The Commission could adopt a rule that states: "A telecommunications carrier must provide SLI to any person who publishes directories in any format, whether in printed, electronic, or oral format. A person has the purpose of publishing directories in any format if such person disseminates by printed, electronic or oral form subscriber listing information, whether or not such information is disseminated in whole or in part." The Commission's rule on nondiscriminatory prices should state: "A telecommunications carrier provides SLI at nondiscriminatory and reasonable rates, terms and conditions if such information is provided to a person who publishes directories in any format on the same rates, terms and conditions as such information is made available to similarly situated persons, i.e., persons who are in comparable or competing lines of business, under any provision of law." To avoid any possible evasion of its pro-competitive mandate, the Commission should clarify in its report and order that this requirement means that competitive DA providers would gain access to SLI at the same rates, terms and conditions as other entities providing that same service

Determine that DA providers are entitled to such information under Section 222(e), but decline to proscribe a rate or rate structure and leave to the complaint process adjudication of what "nondiscriminatory" rates means. This would represent a helpful first step by establishing a right to SLI. It also would leave intact favorable state decisions in New York and California, even though it would trigger time-consuming and resource-intensive adjudication before the Commission. This latter concern could be ameliorated with an express reference to the Commission's "rocket docket" mechanism. Alternatively, the Commission could issue a further notice that tentatively concludes that the appropriate benchmark for DA providers are similarly situated competitors – a position taken by states like New York and California.

---

[4] The Court of Appeals for the District of Columbia has repeatedly underscored that the Commission enjoys considerable interpretive discretion under *Chevron* where the tools of statutory interpretation do not point to a single answer. Just recently the Court of Appeals concluded that the Commission's interpretation of Section 271's restriction on "providing" long distance service was reasonable and fit with the Act's purpose. *See U S West Communications v. FCC*, 1999 WL 362834, *1 (D.C. Cir. June 8, 1999).

Decline to give an advantage to one form of non-printed directories, i.e., those distributed via the Internet, over another form of non-printed directories, i.e., those distributed orally using telephone lines. To do so would be arbitrary in favoring one of two technologies that are converging, and also would prejudice the Commission's further decisionmaking processes (by suggesting some distinction between different non-print publishers). If the Commission is in doubt whether non-printed directories are subject to Section 222(e), then it should issue a further notice asking for comment on that matter. It should not adopt an arbitrary and capricious rule that some forms of non-printed directories are covered under its rules and others are not.

In the alternative, the Commission could issue a Further Notice of Proposed Rulemaking, or a new Notice, seeking comment on a number of issues affecting competitive DA providers. The Commission has broad authority under Sections 222(e), 201, 202, 205, and 251 to promote competition in the directories market. The Commission has relied on this broad authority in different contexts, e.g., paging, to promote the pro-competitive goals of the 1996 Act. A Notice could seek comment on how and whether this broad authority could be used to establish access for competitive DA providers to SLI and to set nondiscriminatory rates. The Commission also could seek comment on rates that other DA providers, namely CLECs, pay for SLI under other provisions of law. This information would give the Commission a record to proceed under Sections 201, 202, and 251 to promote competition in the DA market.

Conclusion

The Commission should adopt rules pursuant to Section 222(e) that establish (1) DA providers constitute "a publisher of directories in any format"; and (2) "non-discriminatory" access for DA providers means that they can obtain SLI on the same terms and conditions as similarly situated competitors (i.e., the major CLECs).

Sincerely,

Gerard J. Waldron
Mary N. Williams
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, D.C. 20044
(202) 662-6000

Counsel to INFONXX

June 28, 1999

cc: Ms. Magalie Roman Salas and Service List
Messrs. Jordan Goldstein and William Kehoe

CERTIFICATE OF SERVICE

On June 29, 1999, a copy of these comments were delivered by hand to the following persons:

The Honorable William E. Kennard
Chairman
Federal Communications Commission
Room 8-B201
445 12th Street, S.W.
Washington, D.C. 20554

ATTN: Dorothy Atwood

The Honorable Susan Ness
Federal Communications Commission
Room 8-B115
445 12th Street, S.W.
Washington, D.C. 20554

ATTN: Linda Kinney

The Honorable Harold Furchtgott-Roth
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20544

ATTN: Kevin Martin

The Honorable Michael K. Powell
Federal Communications Commission
Room 8-A204A
445-12th Street, S.W.
Washington, D.C. 20554

ATTN: Kyle Dixon

The Honorable Gloria Tristani
Federal Communications Commission
Room 8-C302
445-12th Street, S.W.
Washington, D.C. 20554

ATTN: Sarah Whitesell

Lawrence E. Strickling
Chief
Common Carrier Bureau
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

William A. Kehoe, III
Common Carrier Bureau
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

Magalie Roman Salas
Secretary
Federal Communications Commission
445-12th Street, S.W.
12th Street Lobby
Counter TW-A325
Washington, D.C. 20554

Robert Atkinson
Common Carrier Bureau
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

Jordan Goldstein
Common Carrier Bureau
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

Carol E. Mattey
Common Carrier Bureau
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

Kurt Schroeder
Common Carrier Bureau
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

Greg Cook
Common Carrier Bureau
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

Barbara E. D'Avilar